Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Telecommunications Act of 1996:	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information	)	CC Docket No. 96-115

COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN RESPONSE TO AT&T WIRELESS SERVICES, INC.'S, VERIZON'S AND ARIZONA CORPORATION COMMISSION'S PETITIONS FOR RECONSIDERATION OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115

The Cellular Telecommunications & Internet Association ("CTIA")[1] respectfully submits these comments in response to the Petitions for Reconsideration filed by AT&T Wireless Services, Inc. ("AWS"), Verizon, and the Arizona Corporation Commission ("ACC") regarding the Commission's Third Report and Order in CC Docket No. 96-115.[2] Several years ago, the Commission adopted CPNI rules, and concluded that more restrictive

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *See In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; 2000 Biennial Annual Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers,* CC Docket Nos. 96-115, 96-149, 00-257, Notice of Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 67 Fed. Reg. 76406 (Dec. 12, 2002) (individually, "AWS Petition," "Verizon Petition," and "ACC Petition").

state CPNI rules would be vulnerable to preemption. The Commission's recent reversal of this presumption comes as a surprise, given that it did not seek comment on the preemption issue, and did not give any indication that it intended to change its preemption policy.[3] In other words, until the release of the *Third R&O*,[4] carriers had reason to believe that the Commission was still committed to Congress' goal of establishing a uniform national CPNI policy. CTIA objects to the Commission's deviation from its long-standing preemption presumption without adequate reason or explanation, without public notice, and contrary to Congressional intent.

For the reasons explained herein, CTIA supports AWS's and Verizon's Petitions and objects to the ACC's Petition. In order to effectuate Congress' intent, to avoid imposing unnecessary burdens on telecommunications carriers and their customers, and to avoid violating the First Amendment, the Commission should reinstate the preemption presumption.

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[3] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*; Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506 (2001), ¶¶ 1-36 ("*Clarification Order*").

[4] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; 2000 Biennial Annual Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers,* CC Docket Nos. 96-115, 96-149, 00-257, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) ("*Third R&O*").

BACKGROUND

The Commission first addressed the issue of preemption in 1998.[5] At that time, the Commission recognized that "where a carrier's operations are regional or national in scope, state CPNI regulations that are inconsistent from state to state may interfere greatly with a carrier's ability to provide service in a cost-effective manner."[6] After carefully weighing whether the Commission's jurisdiction extended to intrastate telecommunications matters, the Commission concluded that "section 222, and the Commission's authority thereunder, apply to regulation of intrastate and interstate use and protection of CPNI. We find, therefore, that the rules we establish to implement section 222 are binding on the states, and that the states may not impose requirements inconsistent with section 222 and our implementing regulations."[7]

The Commission explained in detail the reasoning behind its conclusion that inconsistent state rules should be preempted:

> State rules that likely would be vulnerable to preemption would include those permitting greater carrier use of CPNI than section 222 and our implementing regulations announced herein, as well as those state regulations that sought to impose more limitations on carriers' use. This is so because state regulation that would permit more information sharing generally would appear to conflict with important privacy protections advanced by Congress through section 222, whereas state rules

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[5] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶¶ 11-20 (1998) ("*Second R&O*").

[6] *Second R&O*, ¶ 16.

[7] *Id.* ¶ 20.

that sought to impose more restrictive regulations would seem to conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information. In either regard, the balance would seemingly be upset and such state regulation thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[8]

Also in the *Second R&O*, the Commission adopted CPNI rules that required carriers to obtain opt-in consent prior to using CPNI to market service outside the customer's existing service relationship.[9] These rules were successfully challenged by U.S. West as a violation of carriers' First Amendment rights.[10] The Tenth Circuit Court of Appeals, applying the *Central Hudson* test,[11] found that the Commission had not adequately established an evidentiary record to support its opt-in regime, particularly where the opt-out option was both readily available and less burdensome on speech.

Following the *U.S. West* decision, the Commission sought public comment, in part, to build a record to support an opt-in approach.[12] After careful consideration, however, the Commission concluded that it could only lawfully adopt bifurcated rules; thus, "use of CPNI by carriers or disclosure to their affiliated entities providing communications-related services, as well as third-party agents and joint venture partners providing communications-

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[8] *Id.* ¶ 18.

[9] *Id.* ¶¶ 88-107.

[10] *See U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

[11] *See Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 477 U.S. 557 (1980).

[12] *See Clarification Order*, ¶¶ 14-22.

related services, requires a customer's knowing consent in the form of notice and 'opt-out' approval," but "disclosure of CPNI to unrelated third parties or to carrier affiliates that do not provide communications-related services requires express customer consent, described as 'opt-in' approval."[13]

Importantly, despite state input,[14] the Commission concluded that "an opt-in rule for intra-company use cannot be justified based on the record we have before us."[15] States had an opportunity to build the requisite evidentiary record to support opt-in rules, but the Commission found that it could not fully implement an opt-in regime without running afoul of the First Amendment and the Tenth Circuit's *U.S. West* decision. "[D]espite the laudable efforts of the parties to generate such an empirical record, not to mention our own efforts, no more persuasive evidence emerged that would satisfy the high constitutional bar set by the court."[16]

Nevertheless, the Commission reversed the preemption presumption and left open the possibility that "states may develop different records should they choose to examine the use

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[13] *Third R&O*, ¶ 2.

[14] *See Third R&O*, Appendix A (noting that comments were submitted by the California Public Utility Commission and the National Association of Regulatory Utility Commissioners); *see also Ex Parte* Comments of the Texas Office of Public Utility Counsel (Apr. 16, 2002); *Ex Parte* Comments of the Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the Territory of the U.S. Virgin Islands, the District of Columbia's Corporation Counsel, and the Administrator of the Georgia Governor's Office of Consumer Affairs (Dec. 26, 2001); *Ex Parte* Comments of the Attorney General of Arizona (Feb. 4, 2002 and Jan. 29, 2002).

[15] *Third R&O*, ¶ 31.

[16] *Third R&O*, Separate Statement of Chairman Michael K. Powell.

of CPNI for intrastate services."[17] "Should states adopt CPNI requirements that are more restrictive than those adopted by the Commission, we decline to apply any presumption that such requirements would be vulnerable to presumption."[18] The Commission stated that the reversal was necessary as a result of its new bifurcated opt-in/opt-out approach and its previous failure to take into account First Amendment concerns.[19]

DISCUSSION

When the Commission initally adopted CPNI rules, it concluded that more restrictive state CPNI rules would be vulnerable to preemption. The Commission's failure to explain its departure from its prior view that "state regulation [of CPNI] thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[20] is impermissible under established principles of Administrative Law,[21] especially given that the Commission did not seek comment on the preemption issue, and did not give any indication it intended to change its preemption policy.

The Commission recognized that "Congress envisioned . . . a uniform national CPNI policy."[22] Nevertheless, the Commission has taken action that is directly contrary to this objective. The end result will be a patchwork of varying state laws, hardly the uniform national policy sought by Congress. By encouraging states to craft their own regulations, the

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[17] *Third R&O*, ¶ 71.

[18] *Id.* ¶ 70.

[19] *Id.*

[20] *Second R&O*, ¶ 18.

[21] *See Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

[22] *Clarification Order*, ¶ 13.

Commission has disregarded its congressional mandate. The Commission had it right the first time. In the Commission's own words, state rules that impose more restrictive CPNI regulations "conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information," upset the balance between carriers' First Amendment rights and consumers' privacy interests, "negate the Commission's lawful authority over interstate communication," and "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23]

The importance of a uniform national CPNI policy cannot be overstated, particularly for wireless carriers. In 1993, Congress amended section 332(c) of the Communications Act in recognition of the interstate nature of mobile services and the federal interest in fostering nationwide, seamless wireless networks.[24] Wireless carriers serve customers across the country, offering nationwide service plans. Although state CPNI schemes purport to regulate only intrastate telecommunications matters, as pointed out in the AWS Petition, wireless carriers do not separate their marketing or their services on a state-by-state basis. Requiring such unnecessary separation will impose enormous costs on carriers and seriously impact their ability to create and market calling plans that fit the needs of individual customers. Carriers will be forced to either spend substantial sums of money building new databases, or resort to one-size-fits-all marketing. Neither option benefits carriers or their customers.

Because carriers' integrated nationwide services cannot simply be divided into interstate and intrastate classifications, the effect of not preempting inconsistent state CPNI laws is to subject carriers to wholly varying state regulations. Moreover, this predicament is

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[23] *Second R&O*, ¶ 18.

[24] *See* H.R. Rep. No. 103-111, at 260 (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 587 ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.").

no longer hypothetical. As a result of the Commission's reversal on the preemption issue, several states have proposed, and Washington State has enacted, CPNI rules that are more restrictive than the Commission's rules.[25]

The effects of varying state regulations are especially problematic for wireless carriers. How will these state laws be applied to uniquely wireless activities? For instance, if CPNI is generated by a customer while roaming outside her home state, is the CPNI governed by the laws of her home state or by the laws of the state in which she made the call? Likewise, state regulations do not contemplate that location-based information is a form of CPNI.[26] Allowing inconsistent state rules to govern wireless carriers will stymie the development of location-based services, particularly if different rules apply depending on where the caller happens to be at any given moment.[27]

By not acting to preempt more restrictive rules, the Commission has allowed state regulatory schemes to supplant its own. Not only does this situation weaken the Commission's authority, it directly contradicts Congress' goal of national uniformity, and should be corrected.

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[25] *See In the Matter of Adopting and Repealing: WAC 480-120-201 through WAC 480-120-209 and WAC 480-120-211 through WAC 480-120-216 Relating to Telecommunications Companies – Customer Information Rules*, Washington Utilities and Transportation Commission, Docket No. UT-990146, Order Adopting and Repealing Rules Permanently (Nov. 7, 2002). In contrast to the Commission's CPNI rules, the Washington rules mandate opt-in for all "call detail" information, and permit information sharing only within companies under common ownership. Although the evidence does not exist to justify a complete opt-in scheme, this is precisely what states have begun to implement.

[26] *See* 47 U.S.C. § 222(h)(1)(A).

[27] This issue would likely be clearer if the Commission had not denied CTIA's petition for rulemaking regarding location information. *See In the Matter of Request by Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices*, *Order*, WT Docket No. 01-72 (2002).

In the *Second R&O*, the Commission eloquently articulated the reasoning behind the preemption presumption.[28] The subsequent *U.S. West* decision did not provide a basis for either ignoring this reasoning or reversing the presumption. On the contrary, CTIA agrees with the AWS and Verizon Petitions that the First Amendment provides an even greater reason for the Commission to apply the preemption presumption.

The Tenth Circuit rejected the Commission's original opt-in approach because it violated the First Amendment. Allowing the states to adopt the same approach encourages the states to do through the back door what the Commission was unable to do through the front door. As a matter of policy, this sets a regrettable precedent.

The states had an opportunity to present evidence to the Commission to support opt-in rules, but the Commission recognized that the evidentiary record would not survive a First Amendment challenge. As explained in both the AWS and Verizon Petitions, nothing before the Commission suggests that the states have other evidence available or that they will make rules based on a different record. The Commission's failure to apply the preemption presumption shifts the burden to the states to test the limits of the First Amendment, and ensures that carriers, and ultimately consumers, will bear the costs of challenging the same flawed record 50 different times.

Carriers are now facing onerous compliance with a multitude of different, more restrictive state CPNI laws. If the Commission is serious about "not tak[ing] lightly the potential impact that varying state regulations could have on carriers' ability to operate in a multi-state or nationwide basis," it must apply the presumption that more restrictive state CPNI rules are preempted.[29]

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[28] *Second R&O*, ¶ 18.

[29] *Third R&O*, ¶ 71.

CONCLUSION

CTIA supports AWS's and Verizon's Petitions for Reconsideration and agrees that the Commission should retract its decision to allow states to enact more restrictive state CPNI rules. By not presuming that such rules are preempted, the Commission undermines its own authority and Congress' intent, unnecessarily imposes costs and burdens on carriers and their customers, and encourages infringement of carriers' First Amendment rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher R. Day, hereby certify, that I have on this 26th day of December, 2002, sent via U.S. First Class Mail, postage prepaid, a copy of the foregoing Comments of the Cellular Telecommunications & Internet Association in Reponse to AT&T Wireless Services, Inc.'s, Verizon's and Arizona Corporation Commission's Petition for Reconsideration of Third Report and Order in CC Docket No. 96-115 to the following:

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